

STATE OF MICHIGAN
COURT OF APPEALS

DONALD R. BURNEY,

Plaintiff-Appellant,

v

DAWN M. BUSH,

Defendant-Appellee.

UNPUBLISHED

September 18, 2003

No. 245227

Wayne Circuit Court

Family Division

LC No. 97-718122-DC

Before: Owens, P.J., and Griffin and Schuette, JJ.

PER CURIAM.

Plaintiff Donald R. Burney appeals as of right from the trial court's November 1, 2002, custody order, which incorporated the court's June 14, 2002, temporary order for parenting time with modifications. We vacate the November 1, 2002, custody order and the June 14, 2002, temporary order and remand for an evidentiary hearing.

I

Plaintiff argues that the trial court erred by effectively modifying an earlier November 13, 1997, consent judgment of custody, support, and parenting time, without conducting an evidentiary hearing. We agree.

It is well established that, absent an agreement of the parties, a court cannot modify orders regarding custody and visitation unless the court first holds an evidentiary hearing. *Mann v Mann*, 190 Mich App 526, 530, 532-533; 476 NW2d 439 (1991). An evidentiary hearing is required, notwithstanding the court's characterization of an order modifying custody as temporary or interim. *Id.* at 531.

A. The Existence of Proper Cause or a Change of Circumstances

As this Court observed in *Rossow v Aranda*, 206 Mich App 456, 457; 522 NW2d 874 (1994), "[a] trial court may amend or modify its previous custody judgment or order only 'for proper cause shown or because of change of circumstances' MCL 722.27(1)(c)." "[W]here the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors." *Rossow, supra* at 458.

B. The Existence of an Established Custodial Environment

Once proper cause or change of circumstances is established, the trial court is then authorized to amend or modify its previous custody judgment or order. If a modification of custody would change the established custodial environment of the child, the moving party must first show by clear and convincing evidence that the change is in the child's best interests through a review of the child custody factors. *Phillips v Jordan*, 241 Mich App 17, 21-22; 614 NW2d 183 (2000). A custodial environment is established if over an appreciable length of time the child naturally looks to the custodian for guidance, discipline, the necessities of life, and comfort. The age of the child, the physical environment, and the inclination of the custodian and the child to permanency should also be considered. MCL 722.27(1)(c). Whether an established custodial environment exists is a question of fact that the trial court must address before it determines the child's best interests. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000).

C. Determination of the Child's Best Interests

Once the court determines whether an established custodial environment exists, the party seeking to modify a custody order must establish that modification is required for the best interests of the child. MCL 722.27; *Stringer v Vincent*, 161 Mich App 429, 433; 411 NW2d 474 (1987). With regard to custody decisions, MCL 722.27(1)(c) provides that a trial court may

[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances. . . . The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. . . .

To determine the best interests of the child, the court must consider the best interest factors set forth in MCL 722.23(a) - (1). The court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances. *McCain v McCain*, 229 Mich App 123, 130-131; 580 NW2d 485 (1998). However, the trial court must consider and explicitly state its findings and conclusions as to each factor. *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001).

In this case, the trial court erred when it failed to conduct a proper evidentiary hearing before modifying the initial custody order entered on November 13, 1997. Therefore, we vacate both the court's June 14, 2002, temporary order and its November 1, 2002, custody order and remand for an evidentiary hearing. The court must make appropriate factual findings regarding the existence of proper cause or a change in circumstances before modifying the November 13, 1997, judgment.

II

We deny plaintiff's request that this case be reassigned to a different judge on remand. We note that plaintiff did not move for disqualification in the trial court pursuant to MCR 2.003. Disqualification under MCR 2.003 requires a showing of actual bias or prejudice. *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). The party seeking disqualification must overcome a heavy presumption of judicial impartiality. *Id.* at 497. In this case, plaintiff

has failed to make a showing of actual or personal bias. Plaintiff's contention that the trial judge became angry because he refused to agree with the judge's desire to dispense with an evidentiary hearing does not demonstrate actual bias or prejudice necessary to satisfy the standard set forth in *Cain, supra*. Nor are we persuaded that reassignment is necessary to avoid an appearance of impropriety, or because the trial judge would have substantial difficulty putting aside previously expressed views or findings. Cf. *Sparks v Sparks*, 440 Mich 141, 163; 485 NW2d 893 (1992); *Ireland v Smith*, 214 Mich App 235, 251; 542 NW2d 344 (1995), *affm'd* and modified 451 Mich 457; 547 NW2d 686 (1996).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Richard Allen Griffin
/s/ Bill Schuette